

COMPLIANCE BOARD OPINION NO. 96-12

November 20, 1996

Mr. Jack Sims

The Open Meetings Compliance Board has considered your complaint dated August 8, 1996, alleging that violations of the Open Meetings Act occurred at a meeting of the Mayor and City Commissioners of the City of District Heights on August 1, 1996. For the reasons set forth below, the Compliance Board finds that aspects of the procedures followed by the Mayor and Commissioners violated the Act.

I

Complaint and Response

Your complaint asserted that proper notice of a closed meeting on August 1 was not given, that the required procedures for closing a meeting were not followed, and that there was no recordkeeping of the closed meeting. We draw from your complaint and its enclosures the following sequence of events: On August 1, the Mayor and Commissioners held a public hearing beginning at 7:00 p.m. and an open meeting beginning at 8:00 p.m. During neither open session was a vote conducted to hold a closed session. Instead, after the conclusion of the 8:00 p.m. meeting, the Mayor and Commissioners met in a separate room, voted to hold a closed session, and in the closed session took a personnel action (dismissing the chief of police).

In a timely response on behalf of the Mayor and Commissioners, Daniel Karp, Esquire, essentially confirmed this sequence of events and provided additional details. The closed meeting was initiated by the Mayor during an interlude between the end of the 7:00 p.m. public hearing and the beginning of the 8:00 p.m. open meeting. The Mayor requested that the Commissioners meet with her in a different room after the 8:00 p.m. meeting ended. This planned session was evidently not announced to the public.

After the end of the open meeting, Mr. Karp confirmed, the Mayor and the four Commissioners met in a separate room. "At the beginning of the meeting, a motion to enter into closed session was made, and the Commissioners unanimously voted to enter closed session." In the closed session, one Commissioner moved to terminate the chief of police; at that point, two other

Commissioners left the room in protest. The quorum that remained voted in favor of the motion. Mr. Karp reported that the events in the closed meeting were publicly disclosed at an open meeting the following week.

In responding to the complaint's allegation that the Open Meetings Act was violated, Mr. Karp reported that the Mayor and Commissioners documented the reason for entering into closed session on an "Executive Session Sheet." He noted that the Mayor and Commissioners went into closed session to discuss a personnel matter, which is a proper reason for holding a closed meeting. Mr. Karp also stated that the vote was recorded and a statement setting forth the reason for the closed meeting and authority for entering into closed session was prepared on the Executive Session Sheet. In addition, Mr. Karp noted that, while the closed session was not tape-recorded, the Open Meetings Act does not require that a closed session be tape-recorded.

With respect to notice of closed meetings, Mr. Karp stated that because the public is not permitted to attend a closed session, only minimal notice of a closed session is required. The notice provided by the City of District Heights, Mr. Karp explained, included a statement that a closed session may be called on August 1, 1996. Specifically, the notice stated that: "An executive session may be called at any of the [listed] meetings. All meetings are open to the public, unless the Commission goes into an executive (closed) session."

II

Analysis

A. Notice

Your complaint states that the City did not give either advanced posted notice or notice at the public meeting of the closed meeting. Thus, in your view, there was no "reasonable advance notice" of the closed session.

If a meeting is subject to the Open Meetings Act, the public body must give "reasonable advance notice of the session." §10-506(a) of the State Government Article. Notice of the meeting is required even if the session may permissibly be closed under one of the Act's exceptions. When a closed session is anticipated, the notice is to contain a statement to that effect. §10-506(b)(3).

The notice of the August 1, 1996 regular meeting provided by the City stated that "an executive session may be called at any of the above meetings." Further, the notice explained that if an executive session was called, it would

be closed. This portion of the notice was sufficient to inform the public that a closed session may occur on that date. Therefore, the Act was not violated in this regard.

B. Procedures to Close a Session

The Act requires certain formal steps “before a public body may meet in closed session.”¹ First, the presiding officer must “conduct a recorded vote on the closing of the session.” §10-508(d)(2)(i). The presiding officer is also responsible for seeing to it that a written statement is prepared, setting out the “reason for closing the meeting,” the specific provision of the Act that allows the meeting to be closed, and “a listing of the topics to be discussed” at the closed session. §10-508(d)(2)(ii). Even if a public body has a basis under the Act’s list of exceptions to conduct a closed session, the public body must begin its meeting in open session so that a vote to close the meeting may be taken and the required written statement may be issued. Compliance Board Opinion 93-2, at 3 (January 7, 1993); Office of the Maryland Attorney General, *Open Meetings Act Manual* 18 (2d ed. 1995).

A public body has no authority under the Act to conduct the vote or issue the statement in closed session. Indeed, the practice of holding the vote in closed session would negate the provision of the Act that provides for objections to the closing: “If a person objects to the closing of a session, the public body shall send a copy of the [required] written statement ... to the [Compliance] Board.” §10-508(d)(3). Members of a public body are accountable for their decision to hold a closed session, and part of their accountability is to make that decision before the public that is about to be excluded.

The Mayor and Commissioners did not vote in open session to enter closed session. The response by the City acknowledged that the Mayor and Commissioners voted to go into closed session after the public meeting had adjourned and after they went to a separate room. Accordingly, the Mayor and Commissioners violated the Act by conducting the vote and issuing the written statement outside of public observation.

Furthermore, the written statement was inadequate. The Executive Session Sheet used by the City indicates that the topic discussed at the August 1, 1996, closed session was a “personnel matter.” This description merely

¹In general, these procedural requirements do not apply when a public body is engaged in an “executive function.” The Mayor and Commissioners, however, did not assert that their closed session concerned an executive function.

repeats the exception that permits the closed session. We recognize that “[t]he level of detail in the written statement required prior to a closed session ... may preserve the confidence of information that led to the session’s being closed in the first place.” Compliance Board Opinion 92-5, at 2-3 (December 22, 1992). Thus, the Mayor and Commissioners need not have described the topic as “proposed termination of chief of police.” Yet, other phrasing — for example, “proposed termination of employee” — would have preserved confidential information without entirely negating the Act’s requirement for disclosure of the “topics to be discussed.” As we wrote previously: “While the level of detail necessarily will vary from one meeting to the next, the Compliance Board believes that use of an uninformative statement of reasons does not comply with §10-508(d)(2).” Compliance Board Opinion 93-2, at 4.

C. Recordkeeping

The Act requires that public bodies keep written minutes of all of their meetings, open and closed, prepared as soon as is practicable after the meeting. §10-509(b). The Act also requires that the minutes reflect “each item” considered, the action taken on each, and each recorded vote. §10-509(c)(1). *See* Compliance Board Opinion 94-2 (May 9, 1994).

A set of handwritten notes and the Executive Session Sheet may be viewed as the “minutes” of the August 1 closed session. Taken together, these two documents contain all of the required information except for the “recorded vote” on the motion to terminate the chief of police. That information may be inferred, but it is not set forth in the manner required by the Act.

Finally, the complaint suggests that the Mayor and Commissioners did not follow past practice of tape recording the closed session. The Act provides that a public body may, but is not required to, tape record its closed sessions.² Therefore, no violation of the Act occurred in this regard.

OPEN MEETINGS COMPLIANCE BOARD

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²“A closed session *may be* tape recorded.” §10-509(c)(3)(i).